CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona
April 26, 2019 - Phoenix, Arizona
May 3, 2019 - Chandler, Arizona

EVIDENCE UPDATE

Presented By:

The Honorable Crane McClennen
Retired Judge of the Maricopa County Superior Court
&
Jonathan Mosher
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Evidence Update

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Rule 106. Remainder of or Related Writings or Recorded Statements

- *State v. Pina-Barajas,* 244 Ariz. 106, 418 P.3d 473 (Ct. App. 2018). Defendant was a prohibited possessor and claimed he needed gun for protection; defendant wanted admitted certain parts of his statement supporting his position.
- **106.015** If the portion of the statement that the party wants admitted does not qualify, explain, or place in context the portion of the statement that is already admitted, or if the portion of the statement that the party wants admitted is not relevant, the trial court should not admit the requested portion.
- ¶¶ 11–13. Court noted statements defendant sought to admit did not show either imminent threat or lack of legal alternatives and thus did not establish necessity defense, so trial court did not err in precluding their admission.

2

Rule 201(b). Judicial Notice of Adjudicative Facts — Kinds of facts

- *State v. Sanders,* 245 Ariz. 113, 425 P.3d 1056 (2018). Defendant claimed he was deprived of jury of 12 qualified jurors because Juror 19, who was later empaneled as presiding juror, was convicted felon and therefore ineligible to serve on jury.
- **201.b.120** An appellate court may take judicial notice of any fact of which a trial court could have taken judicial notice, even if the trial court was not requested to take judicial notice.
- ¶¶ 33–38. Appellate court took judicial notice of Juror 19's superior court records of his criminal case, which showed he was discharged from probation in 2008 and paid his restitution in full, thus by operation of law, his civil right to serve as juror was restored in 2008, well before defendant's 2014 trial.

3

Rule 401. Definition of "Relevant Evidence." (Civil Cases.)

- *Ryan v. Napier,* 245 Ariz. 54, 425 P.3d 230 (2018). Plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court allowed expert to testify about United States Supreme Court case of *Graham v. Connor,* which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim.
- **401.civ.010** For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).
- **401.civ.020** For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).
- ¶¶ 47–52. Court held expert overstepped by testifying that *Graham* governs application of justification defense, but stated that, if expert reasonably relied on factors discussed in *Graham* in forming opinion of officer's conduct, expert could explain factors to jurors, but should not state that "*Graham* factors" originated in Supreme Court opinion.

4

Rule 404(b). Other crimes, wrongs, or acts (Criminal Cases)

- (b) Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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- (b) Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other **relevant** purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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State v. Escalante, 245 Ariz. 135, 425 P.3d 1078 (2018). Defendant contended it was error to admit evidence of how drug organizations operate,

- **404.b.cr.225** Evidence of how drug organizations operate may be admissible to show ***modus operandi*** of such organization and thus may be relevant, typically when a defendant was found with large quantities of drugs and asserts, in defense, no knowledge of the drugs.

- ¶¶ 22–25. Because state did not allege defendant was transporting drugs as part of drug trafficking organization, and defendant (1) was not found with drugs on his person or in vehicle and amount of drugs found was small, (2) did not assert lack of knowledge as defense, and (3) was not charged with drug conspiracy, officer's testimony could not be considered admissible *modus operandi* evidence; defendant did not object, so court reviewed for fundamental error, which it found and found prejudice.

7

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176 (2018). Defendant contended trial court erred in admitting evidence of his prior conviction.

- **404.b.cr.250 Extrinsic** evidence of another crime, wrong, or act is admissible if it is relevant to show **motive**.

- ¶¶ 7–14. Because victim and defendant had previously been friends, but victim had testified against him in criminal proceedings, for which defendant was convicted and sentenced to prison, and because, after defendant got out of prison, defendant saw victim, made negative comments to him, including "I did prison time for him," and then shot and killed victim, evidence of defendant's prior conviction was admissible to show defendant's motive for killing victim.

8

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408 (2018). Officers initiated routine traffic stop and arrested driver on outstanding warrant; officer asked defendant to exit vehicle; ultimately, one officer was shot and killed; defendant contended trial court erred in admitting evidence that defendant had used methamphetamine.

- ¶¶ 38–46. Court held evidence that defendant has used methamphetamine was relevant to explain **defendant's reaction** to officers' presence and his behavior that followed.

9

Rule 501. Requirements for a Privilege. (Marital privilege).

- *Phoenix City Pros. v. Lowery (Craig),* 245 Ariz. 424, 430 P.3d 884 (2018). Husband was concerned wife (defendant) had been drinking and might try to drive, so he parked couple's car behind couple's van to prevent wife from driving away; wife, intoxicated and undeterred by car blocking her way, backed van out, shoving car 15 feet down the driveway; when police arrived, wife was not in van; officer noted property damage to van and car; wife was charged with DUI and criminal damage (domestic violence); wife contended husband could not testify against her in the DUI charge; trial court agreed and severed the two charges for trial.

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- **501.17.080** When a defendant commits a crime against his or her spouse and is charged for that crime, the crime exception to the anti-marital fact privilege allows the witness-spouse to testify about not only that charge, but also about any charges arising from the same unitary event.
- ¶¶ 1, 10–18. Court held husband was victim of criminal damage charge, so anti-marital fact privilege did not apply for that charge, and because criminal damage and DUI charges arose out of unitary event, anti-marital fact privilege did not apply for that charge either.

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Rule 501. Requirements for a Privilege. (Waiver by Statute).

- *State v. Zeitner,* 436 P3d. 484 (2019). Defendant falsely claimed she had cancer in order to have AHCCCS pay for an abortion; defendant contended trial court erred by admitting her medical records and allowing her physicians to testify against her.
- **501.26.020** Because the legislature has created certain privileges by statute, the legislature by statute may limit those privileges and limit the extent of a waiver of those privileges.
- ¶¶ 18–23. Court held that, although there was no common-law exception to the physician-patient privilege for fraud, the legislature had created exception for AHCCCS fraud.

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- **IMPEACHMENT**
- **Specific Impeachment: Related to the specific case.**
- **General Impeachment: Related to the witness's character for truthfulness.**

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- **IMPEACHMENT**
- **Specific Impeachment: Related to the specific case.**
- "Evidence [that] tests, sustains, or impeaches the credibility or character of a witness is generally admissible." *State v. Jeffers,* 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983).
- **Rule 401. Test for Relevant Evidence.** Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

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- **Rule 401. Definition of "Relevant Evidence." (Impeachment Cases.)**
- *State v. Sanders,* 245 Ariz. 113, 425 P.3d 1056 (2018). Defendant claimed trial court violated his due process right to fair trial by denying his motion for mistrial after prosecutor asked several witnesses, "Do you have an independent recollection of this case," and they responded this was "the worst case of child abuse" they had ever seen.
- **401.imp.010** Evidence that tests, sustains, or impeaches a witness's credibility or character is admissible for impeachment or rehabilitation purposes.
- ¶¶ 61–64. Court held prosecutor's questions about witnesses' independent recollections were relevant to establishing their credibility and ability to recall events accurately, and that any prejudice was remedied by trial court's curative instruction.

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- *State v. Trujillo,* 245 Ariz. 414, 430 P.3d 379 (Ct. App. 2018). Defendant was charged with sexual abuse he allegedly committed on 15-year-old at refugee facility; after defendant's supervisor testified about rules concerning interaction with children at facility, defendant sought to introduce evidence that supervisor was fired because "he signed off on a slip that allowed [someone] to drive a vehicle they weren't supposed to drive," but trial court precluded this evidence.
- **401.imp.013** If evidence does not test, sustain, or impeach a witness's credibility or character, it is not admissible for impeachment or rehabilitation purposes.

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- ¶¶ 26–33. Court held relevancy of this evidence was tenuous at best because supervisor's testimony concerned rules defendant was tasked with following when engaging with children, while supervisor was not terminated for violating those rules, and instead was fired for his failure to comply with policy regarding who was permitted to drive facility's vehicles; further, supervisor was fired 14 months after incident defendant was charged with committing.

17

- *State v. Todd,* 244 Ariz. 374, 418 P.3d 1147 (Ct. App. 2018). Defendant claimed trial court erred by precluding her from impeaching witness with evidence of his **pending charges,** contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant.
- **401.imp.070** Specific instances of the witness's conduct or a party's conduct are admissible if they show bias, prejudice, interest, or corruption on the part of the witness, or how they may have affected the witness's testimony.
- ¶¶ 11–16. Court held pending charge was relevant to whether witness had motive to fabricate, thus jurors were entitled to know not only that witness was facing a charge, but also to hear directly from witness whether his testimony was animated by promise, hope, or expectation of leniency in his own case, thus trial court erred by entirely precluding defendant from impeaching witness with his potential motivations, but held, because reliable evidence corroborating witness's testimony predated his need for leniency, probative value of those charges was minimal, and any error in precluding this line of cross-examination was therefore harmless.

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- *State v. Todd,* 244 Ariz. 374, 418 P.3d 1147, ¶¶ 17–20 (Ct. App. 2018). Defendant claimed trial court erred by precluding her from impeaching witness with evidence of **potential charges,** contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant
- ¶¶ 17–20. Because witness admitted he was worried about being charged as prohibited possessor, he had potential motive to fabricate; jurors should have had opportunity to determine whether witness's fear of being charged motivated him to fabricate, thus defendant should have been allowed to cross-examine witness about that concern and whether it was motivating witness's testimony; however, given circumstances of this case, any error was harmless.

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IMPEACHMENT

General Impeachment: Related to the witness's character for truthfulness.

- **Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.**
- **(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
- . . . .
- (3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

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- **Rule 607. Who May Impeach a Witness.**
- **Rule 608. A Witness's Character for Truthfulness or Untruthfulness.**
- **(a) Reputation or Opinion Evidence.**
- **(b) Specific Instances of Conduct.**
- **Rule 609. Impeachment by Evidence of a Criminal Conviction.**
- **(a) In General.**
- (1) [for a felony].
- (2) [for a felony or misdemeanor involving a dishonest act or false statement].

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Rule 608(b). Character for Truthfulness or Untruthfulness — Specific instances of conduct.

- (b) Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
- (1) the witness . . . .

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- *State v. Duarte,* 2018WL6241483 (Ct. App. Nov. 29, 2018). Defendant asserted victim's 13-year-old felony conviction for attempted hindering prosecution "was admissible under Rule 608 because it was a specific instance of misconduct involving untruthfulness to law enforcement officers conducting an investigation," insisting that "[l]ying to the police while they are conducting an investigation is unquestionably an act that speaks to a person's veracity as a witness."
- **608.b.020** The trial court should preclude impeachment with specific instances of conduct if it concludes that the conduct is not probative of truthfulness.

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- ¶¶ 32–34. Court held trial court did not abuse discretion in concluding victim's 13-year-old felony conviction for attempted first-degree hindering prosecution was not probative of truthfulness.
- *State v. Trujillo,* 245 Ariz. 414, 430 P.3d 379, ¶ 33 (Ct. App. 2018): Court held supervisor's failure to follow employer's rule did not show character for untruthfulness.

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- **Rule 609. Impeachment by Evidence of a Criminal Conviction.**
- **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for **[a felony]**, the evidence:
- (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
- (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
- (2) for **[a felony or misdemeanor]**, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

25

- "[A] major crime entails such an injury to and disregard of the rights of other persons that it can reasonably be expected the witness will be untruthful if it is to his [or her] advantage."
- **State v. Green,** 200 Ariz. 496, 29 P.3d 271, ¶ 8 (2001).

26

Rule 609(a)(2). Impeachment with conviction of crime involving dishonest act or false statement.

- *State v. Winegardner,* 243 Ariz. 482, 413 P.3d 683 (2018). State charged defendant with one count of sexual conduct with his 15-year-old stepdaughter committed in 2012; defendant contended trial court erred in precluding him from impeaching victim with her 2015 misdemeanor shoplifting conviction, for which he offered no details other than stating that it was a crime of moral turpitude.
- **609.a.2.010** The phrase "dishonest act or false statement" should be construed narrowly to include only those crimes that involve deceit, untruthfulness, or falsification, thus a misdemeanor or felony conviction is admissible under this section only if the elements of the crime required proving, or the witness's admitting, some element of **deceit, untruthfulness, or falsification**.

27

- ¶¶ 6–17. Court held that elements of shoplifting do not necessarily involve **deceit, untruthfulness, or falsification**.
- A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, the person knowingly obtains such goods of another with the intent to deprive that person of such goods by:
- 1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price; or
- 2. Charging the purchase price of the goods to a fictitious person or any person without that person's authority; or
- 3. Paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price tag or marking; or
- 4. Transferring the goods from one container to another; or
- 5. Concealment.

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- **609.a.2.020** When the legal elements of an offense do not necessarily involve a dishonest act or false statement, the factual basis for the prior conviction may warrant admission of the conviction for impeachment purposes, in which case, the party seeking admission of the prior conviction bears the burden of establishing the factual basis for its admission, which may come from such sources as the indictment, a statement of admitted facts, or jury instructions, but this rule does not permit a "trial within a trial" delving into the factual circumstances of the conviction by scouring the record or calling witnesses.
- ¶¶ 19–24. Because defendant provided trial court with no information showing shoplifting conviction involved dishonest act or false statement, trial court did not abuse its discretion in precluding evidence of shoplifting conviction.

29

- *State v. Duarte,* 2018WL6241483, ¶¶ 20–29 (Ct. App. Nov. 29, 2018). Defendant contended trial court erred in precluding him from impeaching victim with her felony conviction for attempted first-degree hindering prosecution; court held offense of hindering prosecution can occur in multiple ways, not all of which necessarily involve "a dishonest act or false statement," thus it was not *per se* admissible under Rule 609(a)(2); further defendant did not provide trial court with any documentation showing that victim's conviction in particular was one involving "a dishonest act or false statement"; trial court therefore did not err in precluding impeachment.

30

Rule 609(a)(1). Impeachment by Evidence of a Criminal Conviction — Impeachment with a felony conviction.

- *State v. Todd,* 244 Ariz. 374, 418 P.3d 1147 (Ct. App. 2018). Defendant contended trial court erred in sanitizing witness's prior conviction to preclude fact it was for receiving stolen property.
- **609.a.1.180** The trial court has discretion to impose limits in order to minimize prejudice, such as "sanitizing" the conviction by not disclosing the nature of the prior conviction.
- ¶¶ 9–10. Court held that, even assuming arguendo trial court is barred from sanitizing prior conviction that involves dishonesty, receiving stolen property is not such offense, and because witness's prior convictions did not involve dishonesty or false statements and because witness's prior felony history "was discussed at length at trial," trial court did not err by sanitizing conviction.

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Rule 609(b). Impeachment by Evidence of a Criminal Conviction — Time limit.

(b) Limit on Using the Evidence After 10 Years.

- This subsection (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

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- *State v. Todd,* 244 Ariz. 374, 418 P.3d 1147 (Ct. App. 2018). Defendant contended trial court should have allowed her to impeach witness's testimony with evidence of his then 15-year-old conviction for trafficking methamphetamine
- **609.b.005** In determining whether to admit a prior conviction for impeachment purposes, the trial court should consider such factors as the nature of the prior offense, the similarity of the prior offense and the present charged offense, the age of the witness, the remoteness of the conviction, the length of the prior imprisonment, the witness's conduct since the prior offense, the importance of the witness's testimony, and the centrality of credibility issue.

33

- ¶¶ 5–7. Court held evidence of witness's 15-year-old conviction did not meet elevated requirements of Rule 609(b): (1) offense was of low probative value because it occurred over 10 years before witness testified; (2) record did not contain specific facts or circumstances indicating probative value of that conviction substantially outweighs its prejudicial effect; and (3) record did not indicate defendant served state with written notice of intent to impeach witness with that conviction as required; thus trial court properly precluded impeachment.

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- **609.b.040** Before the trial court may admit for impeachment evidence of a conviction more than 10 years old, the proponent must give the adverse party reasonable written notice of the intent to use it.
- *State v. Duarte,* 2018WL6241483, ¶¶ 20–29 (Ct. App. Nov. 29, 2018). Court held trial court did not err in concluding written notice given 4 days before trial was not reasonable.

35

- **Rule 611(b). Mode and Order of Examining Witnesses and Presenting Evidence — Scope of cross-examination.**
- **611.b.015** A criminal defendant is entitled to confront a witness concerning potential bias or hope of reward.
- *State v. Todd,* 244 Ariz. 374, 418 P.3d 1147, ¶¶ 11–16 (Ct. App. 2018). Court held evidence of pending charge was relevant to whether witness had motive to fabricate.
- ¶¶ 17–20. Court held evidence of potential charges could show motive to fabricate because state might show him leniency by cooperating against defendant.

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Rule 702. Testimony by Expert Witnesses.

- *Engstrom v. McCarthy,* 243 Ariz. 469, 411 P.3d 653 (Ct. App. 2018). In dissolution proceeding, mother contended father's expert witness was not qualified to testify.
- **702.020** A witness may be qualified as an expert by knowledge, skill, or experience.
- **702.b.010** A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

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- ¶ 27. Father's expert witness was licensed psychologist who had undergone years of training and served as an expert witness in dozens of cases, and had interviewed all relevant parties and reached his expert opinion based on interviews he conducted and facts he learned from those interviews; court held trial court did not abuse its discretion by allowing expert to testify and give his opinions.

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Rule 703. Bases of an Expert's Opinion Testimony.

- *State v. Meeds,* 244 Ariz. 454, 421 P.3d 653 (Ct. App. 2018). Defendant contended trial court abused its discretion in allowing gang expert to rely on prior police investigation reports.
- **703.010** If the party offering the evidence establishes that experts in a particular field would reasonably rely on certain kinds of facts or data in forming an opinion on the subject, those facts or data need not be admissible for the opinion to be admitted.
- ¶ 17. Court held trial court did not abuse discretion in allowing gang expert to rely on prior police investigation reports in forming opinion about membership in criminal street gang.

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Rule 704. Opinion on an Ultimate Issue.

- *State v. Meeds*. Defendant contended trial court abused its discretion in allowing gang expert to give opinion that defendant met at least four criteria for membership in criminal street gang.
- **704.010** Opinion evidence is admissible even if it involves an ultimate issue in the case.
- ¶¶ 13–16. Court held trial court did not abuse discretion in allowing gang expert to give opinion that, based on his knowledge and experience of Lindo Park Crips, and based on his review of evidence and his observations at trial, defendant met at least four criteria for membership in criminal street gang.

40

Rule 803(1). Exceptions to the Rule Against Hearsay — Regardless Whether the Declarant Is Available as a Witness — Present sense impressions.

- *State v. Malone,* 245 Ariz. 103, 425 P.3d 592 (Ct. App. 2018), ***rev. granted.*** Defendant contended trial court abused its discretion it allowing witness (sister) to testify about what she heard the (now deceased) victim say.
- **803.1.010** A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter

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- ¶¶ 31–32. While victim and her sister were driving to defendant's house, victim was talking to defendant on cell phone, and sister heard victim say: "So you're going to keep threatening me . . . well, whatever, I'm still leaving"; court held statement was admissible as present sense impression. ***rev. granted***.

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